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IN THE

# Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
*Petitioner,*

*v.*

MICHAEL WAYNE HALEY,
*Respondent.*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

## BRIEF FOR PROFESSORS OF LAW JAMES S. LIEBMAN, JORDAN STEIKER, JOHN C. JEFFRIES, JR., WILLIAM J. STUNTZ, ERWIN CHEMERINSKY, AND VIKRAM AMAR AS AMICI CURIAE SUPPORTING RESPONDENT

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**ON WRIT OF CERTIORARI
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Amici, who are law professors with particular expertise in the subject of federal collateral review, respectfully submit this brief supporting affirmance of the judgment below. As a matter of both historical practice and the balance of relevant interests, federal habeas review should be available in circumstances such as those of this case.[1]

## INTEREST OF AMICI

Amici are law professors who teach and write from a range of perspectives on topics that include the history, role, and doctrine of federal collateral review. They accordingly have a professional interest in the proper application and development of the law in this area, and seek to provide the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the Clerk.

Court with a discussion of historical and modern habeas jurisprudence as they bear on the specific question presented in this case.

James S. Liebman is the Simon H. Rifkind Professor of Law at Columbia Law School. He is co-author of a leading treatise on federal habeas corpus, and has written numerous articles on habeas and on criminal procedure. Jordan Steiker is the Cooper H. Ragan Regents Professor of Law at the University of Texas School of Law. He has written numerous articles on habeas and on capital punishment. John C. Jeffries, Jr. is the Dean of the University of Virginia School of Law, and the Emerson Spies Professor of Law and Arnold H. Leon Professor of Law. In addition to several books on criminal law and federalism, he has published numerous articles on constitutional law and federal habeas. William J. Stuntz is Professor of Law at Harvard Law School. He has published widely in the fields of criminal law and criminal procedure. Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California Law School. He has written extensively on federal jurisdiction, constitutional law and federal habeas. Vikram Amar is Professor of Law at the University of California's Hastings College of Law. He has written extensively on issues of constitutional law and federalism.

## SUMMARY OF ARGUMENT

From the time of the founding, courts in this country have heard habeas petitions from individuals who claim that they have been detained without proper legal authority. In broad outline, the 19th century and much of the 20th saw a gradual expansion in the circumstances under which federal habeas relief was available, particularly to state prisoners. While this trend increased protection for individual rights, it also put increased pressure on countervailing interests in finality, comity, and the conservation of judicial resources. In response, this Court over time imposed prudential limitations on the availability of federal collateral review, particularly in cases involving successive petitions or procedurally



defaulted claims. At the same time, in the absence of a governing statutory rule, the Court has always adhered to the principle that habeas is an equitable remedy, and that in appropriate cases, normal procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle* v. *Isaac*, 456 U.S. 107, 135 (1981).

To give practical content to this "miscarriage of justice" principle, the Court has looked both to the historic role of the writ, and to a balancing of the relevant interests as they apply to different categories of cases. On any view of the relevant history, this Court has long considered it a core function of the Great Writ to provide relief when the habeas petitioner is held under a sentence that the sentencing court was not legally authorized to impose. State courts, too, traditionally stood ready to correct such "illegal" (as opposed to merely "irregular") sentences. In other words, it has long been understood that it is a miscarriage of justice to punish an individual more harshly than the law allows, just as it would be to impose any punishment on an individual whose conduct was legally blameless. Fundamental fairness requires that no person suffer a greater punishment than that for which his conduct made him legally eligible.

As to the balancing of interests, the Court has looked to plausible claims of factual innocence as a touchstone in determining when the need to prevent a miscarriage of justice must take precedence. The Court has applied that principle where the habeas petitioner can show "actual innocence" of the offense of conviction, but also where the petitioner is "actually innocent" of some fact or circumstance that was legally necessary to authorize the penalty imposed. Here, the State concedes that the respondent did not in fact qualify as a habitual felony offender under Texas law. The state court that sentenced him therefore had no legal authority to order him imprisoned for longer than two years. Yet, the State seeks to keep him imprisoned for more than 16 years, solely because of an undisputed factual error, and a procedural default in bringing that error to the attention of the courts. In a case such as this one, the individual and societal interests in providing an effective remedy for lawless incar-

ceration are very strong, while the interests in comity, finality, and judicial efficiency are very weak. And in this regard, there is no persuasive reason to distinguish non-capital from capital sentences, or recidivism factors from other factors that increase the maximum sentence that is legally authorized in a given case. Accordingly, both history and reason dictate that the federal courts should be available to hear and determine respondent's habeas claim.

## ARGUMENT

Following a jury trial in a Texas court, respondent Haley was convicted of stealing property worth less than $1,500, after having been convicted twice before of other thefts. J.A. 8-9, 61-67. Under Texas law, the third theft offense ordinarily would have carried a maximum sentence of two years' imprisonment. J.A. 54. Under the State's habitual offender statute, however, the court was required to impose a sentence of from two to 20 years' imprisonment if the State could prove, beyond a reasonable doubt, "that the defendant ha[d] previously been finally convicted of two felonies, and the second previous felony conviction [was] for an offense that occurred subsequent to the first previous conviction having become final." Tex. Pen. Code Ann. § 12.42(a)(2) (West 2003); *see Williams* v. *State*, 899 S.W.2d 13, 14 (Tex. Ct. App. 1995). The State's indictment alleged, and the jury found, that respondent had previously been finally convicted of a drug offense and a robbery, and that the first offense "became final prior to the commission" of the robbery. J.A. 9, 61-67. The court sentenced respondent to 16 years and six months' imprisonment J.A. 61-67.

The State now concedes that both its indictment and the jury's finding were factually incorrect. As the records of the prior convictions presented by the State at sentencing clearly showed, respondent's second prior felony was committed before, not after, his conviction for the first became final. Pet. Br. 4; J.A. 40-51. In these federal habeas proceedings, however, the State has argued that because respondent did not properly raise this issue in the trial court or on direct appeal, the federal courts are powerless to hear respondent's



claim that the State has committed him to prison for fourteen and a half years more than the State's own law authorizes as punishment for his offense. Pet. Br. 5. The district court and the Fifth Circuit held that any procedural default should be excused, on the ground that respondent is "actually innocent" of the habitual-offender finding under which he was sentenced. Pet. App. 20a. In the court of appeals' view, requiring respondent to "continue serving a sentence as an habitual offender" would be "a classic example of a 'fundamental miscarriage of justice'" of the sort that a federal habeas court is always able to correct. *Id.* As presented by the State's petition (Pet. Br. i), the question in this case is whether the "actual innocence" or "miscarriage of justice" principle should be available in a case, such as this one, that involves any sentence short of death.

### THE MISCARRIAGE-OF-JUSTICE PRINCIPLE THAT PERMITS FEDERAL HABEAS COURTS TO HEAR PROCEDURALLY BARRED CLAIMS IN UNUSUAL CASES SHOULD APPLY WHERE A HABEAS PETITIONER CAN SHOW THAT EARLIER PROCEEDINGS HAVE RESULTED IN THE IMPOSITION OF A DEMONSTRABLY UNLAWFUL SENTENCE

Chief Justice Marshall identified the "great object" of the writ of habeas corpus as "the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830). From the time of the founding (and, indeed, before), courts in this country have heard petitions from those who claim that they have been detained without proper legal authority. At the same time, this Court "has always recognized . . . that the Great Writ entails significant costs." *Engle*, 456 U.S. at 126. Over time, Congress and the Court have crafted procedural limitations on federal collateral review, balancing the demand for individual justice against countervailing interests in finality, comity, and the husbanding of scarce judicial resources. In the last analysis, however, the Court has always recognized that systemic concerns, however important, must sometimes "yield to the imperative of correcting a fundamentally unjust

incarceration." *Murray* v. *Carrier*, 477 U.S. 478, 495 (1986) (internal quotation marks and citation omitted).

The difficulty lies in giving practical content to this "miscarriage of justice" principle. In recent years, the Court has approached that task both by looking to historical practice, and by analyzing whether lifting a procedural bar in particular categories of cases would strike an appropriate balance among the relevant interests. The Court's cases have concluded that, at a minimum, a miscarriage of justice has occurred when a habeas petitioner has been subjected to a punishment for which he was not, in fact, legally eligible—either because he was actually innocent of the crime of conviction, or because he was actually "innocent" of some necessary factual predicate for the sentence he received. Although the Court has not previously had occasion to apply the miscarriage-of-justice principle to a non-capital sentence, neither the history of the writ nor the reasoning of this Court's previous cases supports confining the principle's operation to capital cases. In the unusual situation presented by this case, in which respondent is concededly serving a sentence that the State had no legal authority to impose on him, both history and reason suggest that the federal courts should hear respondent's claim.

### A. The Miscarriage-Of-Justice Principle Developed As A Means Of Balancing The Demand For Individual Justice Against Countervailing Interests In Finality, Comity, And The Prudent Administration Of Judicial Resources

The Judiciary Act of 1789 gave federal courts the authority to issue writs of habeas corpus on behalf of persons in federal custody. *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82 (authorizing issuance of the writ to inquire into the "cause of commitment" of any person "in custody, under or by colour of the authority of the United States").[2] In

[2] While Congress has always provided statutory authority for the issuance of the writ, the scope of the remedy has largely been defined by the courts. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.); *Schlup* v. *Delo*, 513 U.S. 298, 319 n.35 (1995) ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence.").



1867, Congress further authorized the federal courts to grant the writ to persons held by a State "in violation of the Constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. As to both federal and state prisoners, the substantive and procedural law concerning federal habeas "has not been without historical uncertainties and changes in direction on the part of the Court." *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977). In broad outline, however, the 19th century and much of the 20th saw a gradual expansion of the circumstances under which the writ was available, particularly to persons in state custody. *See, e.g.*, *id.* at 79; *Kuhlmann* v. *Wilson*, 477 U.S. 436, 446 (1986) (plurality opinion); R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.4d, at 60-66 (4th ed. 2001) ("Hertz & Liebman").

This expansion strengthened the role of federal habeas in protecting individual rights. At the same time, it produced some increase in the workload of the federal courts. It also increased the possibility that the availability of collateral review would "undermine[] the usual principles of finality of litigation." *Engle*, 456 U.S. at 127-128. In addition, as more cases were brought by state prisoners, this Court grew concerned about issues of comity. Federal review could threaten to "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor [federal] rights." *Id.* And that risk could be viewed as particularly serious when some procedural default "has barred a prisoner from obtaining adjudication of his [federal] claim in the state courts," because such a default deprives those courts of an opportunity "to mend their own fences and avoid federal intrusion." *Id.* at 128-129.

In 1953, this Court held that a procedural default that precluded consideration of a federal claim by the state courts barred federal habeas review of that claim. *See Brown* v. *Allen*, 344 U.S. 443, 486-487 (1953). Ten years later, the

Court overruled that aspect of *Brown* in *Fay* v. *Noia*, 372 U.S. 391, 399 (1963). *Fay* made clear that state procedural default did not constitute a jurisdictional bar to consideration of a claim on federal habeas, and suggested that defaulted claims were reviewable as long as the petitioner had not "deliberately bypassed" review by the state courts. *Id.* at 438; *see also Sykes*, 433 U.S. at 82-83 (discussing *Brown* and *Fay*). Finally, in *Wainwright* v. *Sykes*, the Court settled on an intermediate position, reaffirming federal courts' power to consider procedurally defaulted claims, but holding that such claims would generally be reviewed only if the petitioner could establish both cause for the default and some real prejudice stemming from the asserted federal error. *See Sykes*, 433 U.S. at 87; *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991); *Francis* v. *Henderson*, 425 U.S. 536, 541 (1976); *see also United States* v. *Massaro*, 123 S. Ct. 1690, 1693 (2003) ("The procedural default rule is neither a statutory nor a constitutional requirement . . . .").

In the years after *Sykes*, the Court extended the cause-and-prejudice standard to the context of repetitive habeas petitions raising claims that had already been considered once on federal habeas ("successive" claims) or that could have been, but were not, raised in an earlier petition (potentially "abusive" claims). *See, e.g., Schlup*, 513 U.S. at 318-319 (discussing cases); *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991) ("abusive" claims). The Court also applied the cause-and-prejudice standard to petitions seeking collateral review of federal, as well as state, proceedings. *See United States* v. *Frady*, 456 U.S. 152, 167-168 (1982) (procedurally defaulted claims). Cause-and-prejudice thus became a generally applicable test to limit the reviewability of defaulted, successive, or potentially abusive claims, to the extent that Congress has not specified some other governing rule.[3]

[3] In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") altered the previously applicable standards to bar reconsideration of any claim by a state prisoner that was already presented in an earlier federal habeas petition, *see* 28 U.S.C. § 2244(b)(1), and to place significant limits on consideration of such claims raised for the first time in a second or successive petition, *see id.* § 2244(b)(2). AEDPA also limits successive motions by federal prisoners seeking collateral review. *See id.* § 2255. With the exception of a special subset of capital cases not relevant here, AEDPA does not alter the standards that apply to determine whether a claim is barred solely because of a procedural default. *See* Hertz & Liebman § 26.1, at 1135.



In developing and applying these procedural limitations, however, "the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy," and has "consistently relied on the equitable nature of habeas corpus to preclude application of strict rules" of preclusion. *Schlup*, 513 U.S. at 319. Accordingly, the Court has always insisted on leaving room for the consideration of certain claims, by "consistently reaffirm[ing] the existence and importance of [an] exception" from the cause-and-prejudice standard where habeas review is necessary to prevent "fundamental miscarriages of justice." *Id.* at 321. In such cases, the Court has recognized that "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Carrier*, 477 U.S. at 496 (addressing a procedurally defaulted claim) (quoting *Engle*, 456 U.S. at 135); *see also, e.g., Sawyer* v. *Whitley*, 505 U.S. 333, 339-340 (1992) (discussing cases); *Smith* v. *Murray*, 477 U.S. 527, 537 (1986) (noting that the miscarriage-of-justice principle could apply to excuse a procedural default where a death sentence was imposed in error); *Kuhlmann*, 477 U.S. at 452 (plurality opinion) (addressing successive claims, and noting that there are "circumstances under which the interests of the prisoner in relitigating constitutional claims . . . outweigh the countervailing interests served by according finality to the prior judgment"); *Bousley* v. *United States*, 523 U.S. 614 (1998) (recognizing the miscarriage-of-justice exception in the context of a § 2255 petition brought by a federal prisoner). By preserving such an exception, but carefully limiting its scope, the Court has sought to "accommodate[] both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing

justice in the 'extraordinary case.'" *Schlup*, 513 U.S. at 322 (quoting *Carrier*, 477 U.S. at 496).[4]

[4] The State argues that respondent is asserting a "freestanding" claim of actual innocence. Pet. Br. 35. This Court has reserved decision as to whether, in an appropriate case, "a truly persuasive demonstration of 'actual innocence' made after trial" could itself justify habeas relief. *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993). In this case, however, respondent has a cognizable habeas claim even if "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. Respondent can demonstrate both (i) that he does not, in fact, meet the definition of a "habitual offender" under Texas law, and (ii) that given the evidence submitted at trial, no rational fact-finder could have found that he did. The first is a claim of "actual innocence," while the second claims that it violates due process for the State to imprison respondent for fourteen and a half years more than the otherwise applicable statutory maximum sentence, on the basis of a factual finding concerning his prior convictions that the trial record simply cannot support (and, indeed, refutes). *See Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979) (due process violation has occurred if, "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *Thompson* v. *Louisville*, 362 U.S. 199, 206 (1960) ("Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt.").

There is no merit to the State's contention (Pet. Br. 36-37) that actual innocence can be the "gateway" to habeas consideration only for some constitutional claim wholly unrelated to innocence. The very point of the "actual innocence" standard is that equity requires the relaxation of procedural default rules where a habeas petitioner can supply strong evidence of factual innocence. It would be quite inequitable to hold that such a showing cannot provide the justification necessary to hear an otherwise defaulted claim that the underlying conviction or sentencing determination was procured in the absence of sufficient, or indeed any, record evidence.



### B. Applying The Miscarriage-of-Justice Principle To Permit Review Of Demonstrably Unlawful Non-Capital Sentences Is Consistent With The Historical Uses Of Federal Habeas

In seeking to frame the "miscarriage of justice" principle in a way that provides an appropriate equitable safety-valve in exceptional cases, the Court has looked to the historic purpose and uses of the writ, and to its own balancing of the relevant societal and individual interests. *See Kuhlmann*, 477 U.S. at 447-448, 454 (plurality opinion) (undertaking an "ends of justice" inquiry "[i]n light of the historic purpose of habeas corpus" and the interests implicated by allowing review); *Engle*, 456 U.S. at 126-129 (evaluating standards for the excuse of procedural default with reference to the historical role of the writ and the costs of granting review); *Sykes*, 433 U.S. at 77-78 (noting the need to evaluate the historical role of the writ in interpreting the meaning of "unlawful detention"); *Carrier*, 477 U.S. at 495-496 (evaluating scope of the miscarriage exception in light of balance of competing interests); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 253-258 (1973) (Powell, J., concurring) (discussing importance of evaluating historical role of the writ in assessing the meaning of "unjust incarceration"). We address first what history discloses concerning the use of the writ to correct the imposition of punishment in excess of that authorized by law.

The fear that an innocent person may be deprived of his liberty has long been recognized as one of the fundamental concerns underlying the writ of habeas corpus. *See* Hertz & Liebman § 2.5, at 89. Accordingly, one of the principal functions of habeas corpus has always been to assure fair procedures that reduce the risk that any error will "undermine[] the accuracy of the guilt or sentencing determination." *Smith*, 477 U.S. at 539; *see also Bousley*, 523 U.S. at 620; Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) (arguing that federal habeas review should be available where a constitutional claim is supplemented with "a colorable showing of innocence"). And in recent years, in cases

where the Court has "narrowed the reach of the writ, it has repeatedly emphasized that the availability of habeas relief should depend in large measure on whether the petitioner is factually innocent." Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303, 304 (1993); *see also McCleskey*, 499 U.S. at 495; *Carrier*, 477 U.S. at 496; *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). A mechanism for permitting review where factual innocence is in question "serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.'" *McCleskey*, 499 U.S. at 495 (quoting *Stone*, 428 U.S. at 492-493 n.31).

In the sentencing context, factual innocence means, at a minimum, the imposition of a sentence harsher than that authorized by law—or the absence of some factual predicate legally essential to justify the punishment imposed. History demonstrates that relief from such unlawful sentences has long been a core function of the writ.

1. Modern scholarship regarding the historical scope of the writ has been dominated by two competing views: one relatively expansive, the other relatively narrow. *See* Hertz & Liebman § 2.4c. The expansive view, reflected in Justice Brennan's opinion for the Court in *Fay* v. *Noia*, holds that at common law the writ was "available to remedy any kind of governmental restraint contrary to fundamental law." 372 U.S. at 405; *see also* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579 (1982). On that view, the core uses of the writ always extended to remedying a sentence imposed without, or in excess of, lawful authority. *See* Hertz & Liebman § 2.4c, at 36-37 (describing expansive view).

The narrower view of the historical scope of habeas is exemplified by a well-known article by Professor Bator. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). On this view, at its historical core "the writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention." *Schlup*, 513 U.S. at 317; *see also* Bator,



76 Harv. L. Rev. at 471-474; Hertz & Liebman § 2.4c, at 34-36. As Bator recognized, however, the nineteenth-century understanding of "jurisdiction" encompassed not only what we would think of today as formal jurisdiction over person and subject matter, but also broader notions of a court acting within the lawful scope of its authority. Bator, 76 Harv. L. Rev. at 471; *see also Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1047 (1970).

This view of the "jurisdiction" limitation is consistent with a review of this Court's early cases, which manifest concern not only with formal jurisdiction, but also with the "equally critical" question whether the detaining court acted "unlawfully," or without legal authority. Hertz & Liebman, § 2.4d, at 44; *see, e.g.*, *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42 (1822) ("[T]here is no question here, but that this commitment was made by a Court of competent jurisdiction, *and* in the exercise of an unquestionable authority.") (emphasis added). Thus, in the period between 1789 and 1874 (during which federal habeas was governed by the 1789 Judiciary Act), the Court granted both review and relief in cases in which the detaining court had personal and subject-matter jurisdiction, but had acted in excess of its legal authority. *See* Hertz & Liebman § 2.4d, at 43-44 & nn.89, 90 (citing cases); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 166 (1874) (inquiring "whether that [detaining] court has exceeded its authority").[5]

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[5] During this period, the Court reviewed nine habeas cases brought by federal prisoners. In four of those cases it was clear that the detaining authority had formal jurisdiction to order the detention—and yet in three of those, the Court granted relief. *See Lange*, 85 U.S. (18 Wall.) 163 (granting relief where committing court exceeded its legal authority by imposing a sentence of both imprisonment and a fine, when the governing statute authorized only one or the other); *United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17 (1795) (granting relief where arrest on charge of treason was not supported by probable cause); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (granting relief because lower court issued arrest warrant without probable cause); *Ex parte Milburn*, 34 U.S. (9 Pet.) 704 (1835) (granting review but denying relief on a double jeopardy claim). The remaining five cases were *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806) (granting relief from illegal commitment where petitioner was

Moreover, as Professor Bator recognized, the Court expressly held that a court "exceeded its authority" for these purposes, thus rendering its judgment amenable to habeas review, when it imposed a criminal sentence greater than that authorized by the applicable statute. Bator, 76 Harv. L. Rev. at 472 ("[R]eexamination of the validity of the sentence was . . . traditionally available on habeas corpus."); *see also* Friendly, 38 U. Chi. L. Rev. at 151 ("[T]he original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional *or because the sentence was one the court could not lawfully impose.*") (emphasis added).[6]

In *Lange*, the petitioner had been convicted of misappropriating mail bags to his own use. The relevant statute authorized a sentence of "imprisonment for not more than one year *or* a fine of not less than ten dollars nor more than two hundred dollars." 85 U.S. (18 Wall.) at 164. The judge, however, sentenced petitioner to "one year's imprisonment,

summarily incarcerated without a warrant stating an offense, and without trial or conviction); *Ex parte Watkins II*, 32 U.S. (7 Pet.) 568 (1833) (granting relief where petitioner was sentenced to imprisonment and a fine but was held after expiration of the prison term because he had not paid the fine, on the ground that continued detention was unlawful absent an additional court order authorizing further custody); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (granting relief where civilian's conviction by a military tribunal violated his constitutional right to trial by jury before a life-tenured judge); *In re Kaine*, 55 U.S. (14 How.) 103 (1853) (granting review but denying relief where petitioner was held on lawful warrant for extradition); and *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856) (granting review but denying relief after upholding legality of presidential pardon authorizing life imprisonment after commutation of death sentence).

[6] Bator also distinguished claims challenging pretrial detention, for which review was "traditionally available on habeas," from claims that a petitioner sought to raise on habeas only *after* he had already been convicted by a court of competent jurisdiction. Bator, 76 Harv. L. Rev. at 466, 471-472 (comparing cases); *see also* Hertz & Liebman § 2.4c, at 35. He suggested that historically the validity of a sentence might have been viewed in much the same light as a pretrial judicial decision, and thus amenable to reexamination on habeas even where the sentencing court had jurisdiction to enter the judgment of conviction. Bator, 76 Harv. L. Rev. at 472.



*and* to pay two hundred dollars fine." *Id.* After the fine was paid and Lange had served five days of his prison sentence, he sought relief. The sentencing judge then vacated the original sentence and resentenced Lange to one year in prison. Exercising its habeas jurisdiction under the 1789 Judiciary Act, this Court granted relief. The Court concluded that the sentencing judge had acted unlawfully, because after the fine was paid, Lange had "fully suffered one of the alternative punishments to which alone the law subjected him," and at that point "the authority of the court to punish [him] further was gone." *Id.* at 176. It emphasized that although the lower court had jurisdiction over both the petitioner and the offense, "[i]t by no means follow[ed]" that the judgment was immune from habeas review, where the sentence imposed was "in excess of the authority of the court." *Id.* at 176-177. In the Court's striking example, if a court of proper jurisdiction were to preside over the conviction of a defendant for a misdemeanor punishable by a fine, but then sentence the defendant to be hanged, a writ could issue to prevent that result, because the court's judgment would be "void." *Id.*

*Lange* may be viewed as merely an application of settled principles, or as part of a long trend of judicial decisions "gradually . . . expanding the availability of habeas relief." *Sykes*, 433 U.S. at 78. Either way, it is clear that even on the narrower view of history espoused by Professor Bator, for well over a hundred years this Court has considered it a core function of the Great Writ to provide appropriate relief when "the sentence of the . . . Court under which the petitioner is held a prisoner" exceeds the bounds authorized by law, and therefore "was pronounced without authority." *Lange*, 85 U.S. at 178.[7] In other words, it has long been con-

[7] *See also, e.g., Ex parte Wilson*, 114 U.S. 417, 421 (1885) (habeas relief available where "the sentence exceeds the jurisdiction of th[e] court, or there is no authority to hold [a prisoner] under the sentence"); *Ex parte Neilsen*, 131 U.S. 176, 190-191 (1889) (following *Lange* and granting relief where lower court was "without authority" to impose consecutive sentences for what was found to be one charge); *Ex parte Snow*, 120 U.S. 274, 284-285 (1887) (same); *In re Mills*, 135 U.S. 263, 269 (1890) (granting relief

sidered that allowing such an unlawful sentence to stand would result in a fundamental miscarriage of justice.

2. State courts in the nineteenth century also appear to have understood habeas to extend to cases in which a court sentenced the petitioner to greater punishment than was authorized by law. In other words, to the extent that the availability of relief depended on a lack of "jurisdiction" in the committing court, whether that court had the "power to render the particular sentence" was considered an "element[] of [its] jurisdiction." William S. Church, *A Treatise on the Writ of Habeas Corpus* § 356 (2d ed. 1893) (citing cases) ("Church"). The standard view in this regard was that "irregularities" in the proceedings, such as failure to adhere to prescribed rules of procedure, or failure to perform properly some duty that was necessary to the "orderly conduct[] of the suit," were correctable only on appeal or writ of error. In contrast, "illegalities," such as a lack of formal jurisdiction or other lack of legal authority to detain, were cognizable on habeas corpus. *See* Church §§ 348, 353a, 363, 372-373 (citing cases); *see also Ex parte Brown*, 63 Ala. 187 (1879) ("*Illegality*, not *irregularity*, must infect the proceedings, to authorize a discharge on *habeas corpus*"; sentence was not in excess of that authorized by law where the petitioner was sentenced for the offense of which he was convicted, although the judgment erroneously recited a lesser offense).

A sentence was "illegal" in this sense if it entailed greater punishment than the sentencing court was legally authorized to impose. *See* Church § 373 (an "excessive sentence is one by which a greater punishment is inflicted than that allowed by law"); Rollin C. Hurd, *A Treatise on the Writ of Habeas Corpus* 327-328 (2d ed. 1876) (it would be irregular to sentence a defendant in contravention of rules of pro-

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where court did not have statutory power to sentence petitioner to hard labor; petitioner was entitled to relief if "apart from any question as to whether the court below . . . [had] jurisdiction . . . , his detention . . . is in violation of the laws of the United States"); Hertz & Liebman § 2.4d, at 50; Bator, 76 Harv. L. Rev. at 467-468.



cedure; "it would be illegal to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only"). In most courts, habeas relief would simply void the unauthorized portion of the sentence.[8] In some cases, however, habeas courts held that an excessive sentence was entirely void.[9] In any event, under state as well as federal practice, the purpose and operation of the Great Writ have long been understood to extend to providing relief to those held in custody under a sentence that the rendering court lacked the legal authority to impose.

As noted above, the long recognition that habeas relief was warranted for a sentence imposed in excess of the court's authority reflects a corresponding recognition that it is as intolerable to punish given conduct more harshly than the law allows, as it is to punish at all an individual whose conduct was legally blameless. In either case, denying relief causes "an innocent man to suffer an unconstitutional loss of liberty." *Stone*, 428 U.S. at 491 n.31. The writ has for centuries been a "bulwark against convictions that violate fundamental fairness." *Engle*, 456 U.S. at 126 (internal quotation marks and citation omitted). And fundamental fairness requires that no person suffer a greater punishment than that for which he is legally eligible.

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[8] *See, e.g., Ex parte Bulger*, 60 Cal. 438 (1882) (where statute provided for imprisonment not to exceed six months, prisoner sentenced to three years would be released on habeas when six months had expired); *Ex parte Mooney*, 26 W. Va. 36 (1885) (where statute provided for fine or imprisonment and court imposed both, sentence was void as to the excess; although court had jurisdiction over subject and person, the excessive sentence was not authorized by law); Church §§ 353a, 373 (citing additional cases).

[9] *See, e.g., Ex parte Page*, 49 Mo. 291 (1872) (discharging prisoner sentenced to ten years' imprisonment, where statute authorized only up to seven years; detaining court "exceeded its jurisdiction" by imposing a sentence that exceeded lawful authority) (superseded by statute providing authority to void only excess portion of a sentence); Church §§ 353a, 373 (citing cases). In some cases, no relief was granted. *See Ex parte Van Hagan*, 25 Ohio St. 426 (1874) (denying relief where punishment exceeded that authorized by current law, which repealed by implication an earlier law that provided for greater punishment).

### C. Applying The Miscarriage-Of-Justice Principle In These Circumstances Strikes An Appropriate Equitable Balance By Correcting Manifest Injustice In An Unusual Case, Without Substantially Burdening Comity, Finality, Or Judicial Resources

1. In defining the scope of the miscarriage-of-justice exception to procedural bar rules, the Court's modern habeas cases have balanced the systemic interests in comity, finality, and conservation of judicial resources against the need to ensure that habeas relief remains available to prevent manifest injustice. *See, e.g., Engle*, 456 U.S. at 135. The Court has thereby sought to "ensure that the fundamental miscarriage of justice exception [will] remain 'rare' and [will] only be applied in the 'extraordinary case,' while at the same time ensuring that the exception [will] extend relief to those who are truly deserving." *Schlup*, 513 U.S. at 321.

In *Carrier*, the Court observed that a prisoner who has suffered a miscarriage of justice will not always be able to satisfy the cause-and-prejudice test. *Carrier*, 477 U.S. at 496. It concluded that, to satisfy "fundamental fairness," a procedural default should be excused, even without a showing of cause, if the petitioner can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" of the charged offense. *Id.*; *accord Schlup*, 513 U.S. at 321.

*Kuhlmann*, decided the same day as *Carrier*, elaborated on this "innocence" analysis. A plurality of the Court reasoned that in order to identify those cases in which federal courts should exercise their discretion to hear successive petitions, it was necessary to balance concerns of finality and comity against "the historic function of habeas corpus to provide relief from unjust incarceration." *Kuhlmann*, 477 U.S. at 451-452 (plurality opinion). The plurality observed that respecting the finality of state judgments furthers the goals of deterrence, punishment, and rehabilitation of "guilty defendants." *Id.* at 452-453. It concluded, however, that under appropriate circumstances those interests must yield to the habeas petitioner's "powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." *Id.* at 452.



The Court has recognized that the same balancing of interests warrants application of the miscarriage-of-justice exception not only to petitioners who are "actually innocent" of the crime of conviction, but also to petitioners who are "actually innocent" of the penalty imposed. In *Smith* v. *Murray*, the Court indicated that under certain circumstances it would apply the exception in the context of a petition alleging error in the imposition of a death sentence. 477 U.S. at 537. The Court elaborated on that analysis in *Sawyer* v. *Whitley*, concluding that a petitioner could logically be deemed "'actually innocent' of the death penalty" when he could "show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner *eligible* for the death penalty under the applicable state law." 505 U.S. at 336 (emphasis added); *see also id.* at 344-345.

Together, these decisions make clear that "actual innocence," as this Court has used the term in applying the miscarriage-of-justice standard, is not limited to cases in which the petitioner did not commit the crime of which he was convicted. *See id.* at 343 (noting that "actual innocence" has "a more expansive meaning . . . than simply innocence of the capital offense itself"). Rather, the "actual innocence" standard defines a group of cases in which punishment was imposed without legal authority, including cases in which there is a failure of proof on some factual predicate that is legally essential to justify imposition of that punishment. Under the reasoning of *Smith* and *Sawyer*, the miscarriage-of-justice exception thus applies to cases challenging a sentence when the petitioner can show "actual innocence" of some conduct or circumstance that was necessary to render the petitioner legally eligible for the sentence that was imposed.

As *Sawyer* explains, focusing the inquiry on legal eligibility for a particular sentence ensures that plausible invocations of the miscarriage exception will remain rare, and that

the inquiry demanded of habeas courts will be based on "relatively objective standards." *Id.* at 341, 344-345.[10] As compared to a standard that focuses only on guilt or innocence of the underlying crime, the eligibility test "broadens the extent of the inquiry but not the type of inquiry," because in both cases the habeas petitioner is asserting the factual absence of some essential element used to define "the class of defendants [legally] eligible" for a particular penalty. *Id.* at 344-345. Moreover, "proof or disproof" of such eligibility factors, "like proof of the elements of the crime, is confined by the statutory definitions [of penalty-eligibility factors] to a relatively obvious class of relevant evidence." *Id.* at 345. Accordingly, the *Sawyer* Court concluded that consideration of a habeas petitioner's legal eligibility for the death penalty under state law neither threatened significant harm to comity or finality, nor imposed an onerous burden on federal habeas courts. *See id.* at 345-346. At the same time, permitting application of the miscarriage-of-justice principle served the compelling interest in basic justice that habeas has always been meant to protect, by ensuring that a procedural default would not result in the execution of an individual when the applicable law did not, in fact, authorize the imposition of that sentence. *Cf. Smith*, 477 U.S. at 538-539 (noting that a claim implicates fundamental fairness when it involves "the accuracy of the guilt or sentencing determination").

2. Essentially the same balance of interests applies where, as in this case, a petitioner can demonstrate that he is not statutorily eligible for the non-capital sentence under

[10] *Sawyer* rejected a standard under which the habeas court would have been required to consider whether the jury might have reached a different conclusion about the appropriateness of capital punishment if it had been presented with additional mitigating evidence. 505 U.S. at 345-346. The Court reasoned that any such reweighing of discretionary sentencing considerations, as opposed to eligibility factors, would unacceptably "broaden the inquiry" for the habeas court. *Id.* at 345. This functional distinction between errors that affect legal eligibility for a given sentence, on the one hand, and errors that affect only the propriety of a given sentence within a legally authorized range, on the other, is applicable to non-capital as well as to capital sentencing.



which he is confined. Those circumstances strongly implicate the individual and societal interests in providing an effective remedy for a fundamentally lawless, and thus unjust, incarceration. Here, for example, the State concedes (Pet. Br. 4) that respondent did not in fact qualify as a habitual felony offender under Texas law. In other words, he was "actually innocent" of the specific conduct (or circumstance) that was the legal predicate for his sentence. The state court that sentenced him therefore had no legal authority to order him imprisoned for longer than two years. He has already served that term and more. Yet the State seeks to keep him imprisoned for more than fourteen years longer than was ever authorized by state law—solely because of an undisputed factual error, and a procedural default in bringing that error to the attention of the courts.

At the same time, the systemic interests that generally justify procedural bars are at their weakest in cases like this one.

a. Comity concerns arise when "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, 456 U.S. at 128. But any true affront to comity is difficult to discern here. This is not a case where the state trial court was denied a contemporaneous opportunity to correct some mere procedural defect, and should not now be forced to face the prospect of having to retry a defendant who was already once properly convicted on the merits. *Cf. id.* In fact, no substantial additional process is required here. Ascertaining the relevant dates of respondent's two convictions requires no evidentiary hearing or contested sentencing proceeding. Nor have the state appellate courts been denied the opportunity to pass, in the first instance, on some complex or novel question of federal law.

Nor is there is any threat that hearing a claim involving sentence *eligibility* could "frustrat[e] the States' sovereign power to punish offenders." *Id.* The State can articulate no legitimate interest in imposing, or persisting in the enforcement of, a sentence that is concededly invalid *under state*

*law*. To the contrary, one would think that a State's interest lies in ensuring that defendants in its courts are sentenced in *accordance* with state law. Indeed, the present attempt by state prosecutors to characterize the state statutory requirement of sequential convictions as a "legal technicality" (Pet. Br. 23) itself "frustrates the State's sovereign power to punish offenders," by defying the State legislature's decision to proscribe and punish specific behavior. It is the legislature that "has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme," and it is those choices that are entitled to "proper deference." *Ewing* v. *California*, 123 S. Ct. 1179, 1189, 1190 (2003) (plurality opinion).

Finally, the relief accorded in a case such as this will never be to "nullifi[y]" state proceedings. Pet. Br. 21. The appropriate relief in an unlawful sentence case need be nothing other than an order assuring that the defendant will be properly resentenced. The only state process that such an order could "nullifi[y]" would be the continuing imposition of some degree or form of punishment that was never authorized by state law.

b. Finality concerns arise when the prospect of readily available collateral review frustrates the State's interests in punishment of crime, as well as in deterrence and rehabilitation of those who commit crimes. *Kuhlmann*, 477 U.S. at 452-453 (plurality opinion); *Engle*, 456 U.S. at 127 n.32. Yet the systemic interest in finality, which is usually so powerful, has little force in the context of a demonstrably unlawful sentence. As *Kuhlmann* suggested, finality is important because it ensures that the State can successfully punish and rehabilitate "guilty defendants," and deter potential criminals. 477 U.S. at 452-453 (plurality opinion). None of those goals is undermined in the least by a rule that permits consideration of a claim brought by a petitioner who can demonstrate that on the facts of his case, the law never authorized the punishment imposed on him. In this case, for example, it seems little more than a cruel joke to suggest that federal habeas review of a sentence more than eight times the maximum authorized by state law should be disfavored be-



cause it might "'extend[] the ordeal of trial for both society and the accused,'" "interfere[] with the government's ability to exact retribution," or "frustrate[]" the State's ability to convince respondent that he is "justly subject to sanction." U.S. Br. 10-11 (quoting *Engle*, 456 U.S. at 126-127).

c. Cases involving demonstrable ineligibility for a particular sentence should also impose little burden on federal judicial resources. There is no evident reason why there should be many claims of the sort at issue in this case. The number of individuals who can credibly state a claim of *statutory ineligibility* for the sentence they are serving should (one hopes) be very small. Moreover, the basic plausibility or implausibility of such a claim should generally be apparent on the basis of a minimal examination; and even full factual evaluation of a credible claim should seldom require any significant commitment of resources. *See Sawyer*, 505 U.S. at 345-346 (noting "relative ease" of assessing sentence-ineligibility claims). In this case, even without the State's concession that respondent did not satisfy the statutory criteria for the sentence he received, a reviewing court could have made that determination simply by comparing the requirements of the Texas statute under which respondent was convicted and sentenced to the objective, readily ascertainable facts concerning the timing of his prior convictions.[11]

For these reasons, the same balancing of interests that the Court has previously employed in giving content to the miscarriage-of-justice exception leads to the conclusion that where a habeas petitioner can demonstrate statutory ineligibility for the penalty that has been imposed on him, federal habeas should be available to discharge its traditional function of correcting a sentence that the sentencing court was

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[11] The stringent standards the Court has imposed for invoking the miscarriage exception also ensure that it will be applied only in rare, meritorious cases. *See Schlup*, 513 U.S. at 326-330 (comparing standards for evaluating claims of "actual innocence"). Respondent's claim would be cognizable under either the *Sawyer* standard or the somewhat more lenient *Carrier* standard. *See id.*; *see also supra* pp. 18-19.

not legally authorized to impose. The State therefore misses the point with its argument that the Court should not "expand" the miscarriage exception. Pet. Br. 21. Although the Court has not previously had occasion to apply the exception in the context of non-capital sentencing, this case requires only application, not extension, of the Court's previous reasoning.[12]

3. The United States, as amicus, correctly describes the balancing of interests that this Court has used to define the miscarriage exception (U.S. Br. 14), and grudgingly recognizes (*id.* at 20-21) that it would be both "logical" and "administrable" to define a category of, at a minimum, sentencing errors resulting from the improper application of "factors that increase the statutory maximum sentence."[13] The United States also candidly acknowledges (*id.* at 21; *see id.* at 8-9, 27) that because this Court has held that most such factors are or must be treated as elements of aggravated

[12] The State also argues that respondent is relying on a "legal technicality" (Pet. Br. 23), and that he is not "actually innocen[t]" of his sentence as that term is "[n]ormally" used (*id.* at 21). Failure to satisfy the statutory requirements for a ten-fold enhancement in the statutorily authorized maximum sentence for an offense is a "technicality" only in the same sense that a failure of proof on a necessary aggravating factor or other "element[] of [a] capital sentence" would make one only technically "innocent of the death penalty." *Sawyer*, 505 U.S. at 345.

[13] To affirm the Court of Appeals, this Court need hold only that where, as here, a petitioner is demonstrably innocent of the factual predicate that rendered him eligible for a sentence in excess of the otherwise applicable statutory maximum, procedural default may be excused. Accordingly, the United States' extended discussion of sentencing factors that merely affect the exercise of the sentencer's discretion within a statutory maximum term, or that shift the applicable Sentencing Guidelines range within a statutory maximum (U.S. Br. 16-19), is irrelevant to the question presented by this case. Nothing in this case requires the Court to "exten[d] . . . the actual innocence exception to the myriad facts that have an impact on non-capital sentences" (*id.* at 17), or justifies any fear that such an exception could "swallow the rule" (*id.* at 19). The question whether, under some circumstances, the actual innocence principle could also apply to, for example, facts resulting in an increase in the statutory minimum sentence, or facts resulting in the application of a higher range under applicable non-statutory sentencing guidelines, can and should be left for another day.



offenses, the miscarriage exception "would appear already to apply" to any such factor "other than recidivism." Perplexingly, however, the United States goes on to argue that the exception should not be "extended" to recidivism-based statutory aggravators (*id.* at 22-24)—even though it straightforwardly recognizes elsewhere (*id.* at 19) that there is "no logical reason" to treat "habitual or career offender status" differently from any "other factual finding" for purposes of determining whether a habeas petitioner can show "actual innocence" with respect to a sentencing claim.

The United States purports to justify distinguishing recidivism from other statutory factors that render a defendant eligible or ineligible for a particular sentence by asserting (*id.* at 22-23) that treating recidivism the same way for purposes of the miscarriage-of-justice exception would somehow upset "the balance between the societal interest in obtaining closure to the criminal process and the individual interest in avoiding fundamental injustice."[14] The few actual arguments it offers to support that assertion are, however, hopelessly threadbare.[15] Although it is true that this Court

[14] Contrary to the suggestion in this phrasing, the "interest in avoiding fundamental injustice" through the appropriate use of habeas is societal, as well as "individual."

[15] It would, no doubt, surprise most habeas petitioners, including respondent, to learn that their "interest in avoiding fundamental injustice" was fully engaged by any non-recidivism statutory aggravator, because of the "unique stigma and collateral consequences" attendant on conviction of any aggravated offense (U.S. Br. 23)—but not materially implicated by, say, a recidivism aggravator that was misapplied to increase the statutory maximum punishment for their offense from two years' to 20 years' imprisonment. It is likewise rather surprising for the United States to suggest (*id.*) that simply because recidivism factors that enhance statutory maximums are "quite common," federal habeas courts are likely to incur "significant costs" if this Court confirms that *demonstrably erroneous applications* of those factors that unlawfully increase defendants' sentences, and are not corrected at trial, on direct review, or on state habeas, may be addressed on federal habeas even if the petitioner cannot show "cause" for an earlier procedural default. Finally, it is surely unbecoming for the United States to argue (*id.* at 24) that because the particular career offender provisions that Texas and other States have chosen to enact can sometimes be "quite technical," it would be unduly bothersome for the federal courts to take cognizance of an otherwise defaulted claim that "re-

limited the constitutionalization of offense elements in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to non-recidivism factors that increase statutory maximum punishments (U.S. Br. 22), that limitation has no logical bearing on this case. To the contrary, one rationale underlying the limitation is that unlike many statutory aggravators, prior convictions are typically easy to ascertain and prove, and indeed are seldom subject to actual dispute. *See Apprendi*, 530 U.S. at 488; *Almendarez-Torres* v. *United States*, 523 U.S. 224, 235 (1998). As noted above, in the present context, that observation suggests the minimal burden that would be imposed on federal habeas courts by the occasional case, such as this one, in which a habeas petitioner rests a credible claim of sentence-ineligibility on the existence, nature, or timing of one or more previous convictions.[16]

In short, as explained above, the miscarriage-of-justice standard is an equitable "safety valve," designed to ensure that federal habeas remains available to remedy injustice in appropriate cases, even when relief would otherwise be barred because of some procedural default. In shaping and applying the exception, the Court has looked both to the historic uses of habeas, and to an equitable balancing of the interests in justice, finality, comity, and judicial efficiency. On any view of the relevant history, imposition of a sentence in excess of statutory authority has long been considered just the sort of fundamental injustice that the Great Writ should be available to correct. And in a case such as this one, in which systemic burdens are minimal and the interest in jus-

late[s] only to the length of [respondent's] sentence." Given the facts of this case, there is no apparent basis for the claim (Br. 24-25) that any rule that would apply here could not be "limited to the 'extraordinary case' . . . [or] to instances involving a fundamental miscarriage of justice."

[16] To the extent the State or its amici mean to suggest that, in light of *Apprendi*, a sentence longer than the statutory maximum involves a less serious error when it results from erroneous factual findings regarding recidivism, their argument is particularly weak in this case. Texas law permits a habitual-offender enhancement only when the fact and timing of the defendant's prior convictions have been found by the jury beyond a reasonable doubt. *See Williams* v. *State*, 899 S.W.2d 13, 14 (Tex. Ct. App. 1995).



tice large, the balance should surely be struck in favor of allowing the federal courts to hear and determine respondent's habeas claim.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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